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IN THE

Supreme Court of the United States

No. 47.

October Term, 1946.

GEORGE E. HICKMAN, as Administrator of the ESTATE OF NORMAN E. HICKMAN, Deceased,
Petitioner,

v.

JOHN M. TAYLOR and GEORGE H. ANDERSON, Individually, and Trading as TAYLOR & ANDERSON TOWING AND LIGHTERAGE COMPANY,
and
BALTIMORE & OHIO RAILROAD CO.

JOHN M. TAYLOR, GEORGE H. ANDERSON and SAMUEL B. FORTENBAUGH, JR.,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF ON BEHALF OF RESPONDENTS.

SAMUEL B. FORTENBAUGH, JR.,
BENJAMIN F. STAHL, JR.,
SHIELDS, CLARK, BROWN & MCCOWN,
Counsel for Respondents.

International, 236 Chestnut St., Phila. 6, Pa.

INDEX.

SUBJECT INDEX.

	Page
Question presented	1
Statement of the Case	2
Argument	6
Introduction	6
Point I—Federal Rules of Civil Procedure 26, 33 and 34 do not presently require production of writing developed by an attorney in anticipation of litigation	7
Point II—Limiting the scope of discovery to objective facts protects the interrogator from hardship and preserves the benefits of trial by jury	9
Point III—Extension of the scope of examination beyond objective facts is worse than inconsequence because it creates diversion of the issue, insures uneven or arbitrary judicial discretion and breeds conflicting interests	12
Point IV—The discovery rules should be construed uniformly and amended, if necessary, to exempt data developed in anticipation of litigation, particularly by counsel	18
Conclusion	24

TABLE OF CASES CITED.

Page

Bowles v. Ackerman et al., D. C., S. D. N. Y., 4 F. R. D. 260 14

Coca Cola Co. v. Dixi-Cola Laboratories, Inc., D. C., Md., 30 F. Supp. 275 15

Condry v. Buckeye S. S. Co., D. C., W. D. Pa., 4 F. R. D. 310 ..... 12, 14

Courteau v. Interlake S. S. Co., et al., D. C., W. D. Mich., N. D., 1 F. R. D. 525 15

Creden, et al. v. Central R. Co. of New Jersey, D. C., E. D. N. Y., 1 F. R. D. 168 ..... 13, 14

Dugger v. Baltimore & Ohio Railroad Co., D. C., E. D. N. Y., 5 F. R. D. 334 (Adv. Rep.) 14

Edison Electric Co. v. U. S. Electric Lighting Co., 45 Fed. 55 16

Fluxgold v. United States Lines Co., D. C., S. D. N. Y., 29 F. Supp. 506 14

Gitto, et al. v. "Italia", Societa Anonima Di Navigazione, Genova, D. C., E. D. N. Y., 31 F. Supp. 567 14

Gordon v. Pennsylvania R. Co., D. C., E. D. Pa., 9 Fed. Rules Serv. 34.13, Case 1 ..... 8, 13

Hickman v. Taylor, 4 F. R. D. 479, 153 F. (2d) 212 ..... 13, 14, 22

Kenealy v. Texas Co., D. C., S. D. N. Y., 29 F. Supp. 502 14

McCarthy v. Palmer, et al., 29 F. Supp. 585 13

Olson v. New York Central R. Co., D. C., E. D. N. Y., 31 F. Supp. 745 13

Piorkowski v. Socony Vacuum Oil Co., D. C., M. D. Pa., 1 F. R. D. 407 13

Poppino v. Jones Store Co., D. C., W. D. Mo., 1 F. R. D. 215 14

Schenley Import Corporation v. S. S. "S. Thome", D. C., E. D. Pa., No. 47 of 1944 in Admiralty. (Not reported) 13

TABLE OF CASES CITED (Continued).

Page

Seals v. Capital Transit Co., D. C., Dist. of Columbia, 1 F. R. D. 133 15

Shields v. Sobelman, 64 F. Supp. 619 13

Sonken-Galamba Corporation et al. v. Atchison T. & S. F. Ry. Co., et al., D. C., W. D. Mo., 30 F. Supp. 936 14

Stark v. American Dredging Co., D. C., E. D. Pa., 3 F. R. D. 300 13

Stern v. Exposition Greyhound, Inc., D. C., E. D. N. Y., 1 F. R. D. 696 14

United States v. Aluminum Co. of America, et al., D. C., S. D. N. Y., 1 F. R. D. 57 14

United States v. National City Bank of New York, et al., D. C., S. D. N. Y., 2 F. R. D. 46 15

Walling v. Richmond Screw Anchor Co., Inc., D. C., E. D. N. Y., 4 F. R. D. 265 14

MISCELLANEOUS.

Page

Discovery Procedure Symposium—before the 1946 Conference of Third United States Circuit Court of Appeals, 5 F. R. D. 403 (Adv. Rep.) 22

Federal Rules of Civil Procedure, Nos. 26-34 ..... 2, 6, 7, 8, 12, 23

Proposed Rules of Civil Procedure governing depositions and discovery (Pennsylvania)—Report on proposed amendments to Rules of Civil Procedure for the District Courts of the United States (June 1946) 9, 12, 19, 23

The Yearly Practice of the Supreme Court for 1938 (English) 21

IN THE

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No. 47.

OCTOBER TERM, 1946.

GEORGE E. HICKMAN, AS ADMINISTRATOR OF THE ESTATE OF NORMAN E. HICKMAN, DECEASED,
Petitioner,

v.

JOHN M. TAYLOR AND GEORGE H. ANDERSON, INDIVIDUALLY AND TRADING AS TAYLOR & ANDERSON TOWING AND LIGHTERAGE COMPANY,

AND

BALTIMORE & OHIO RAILROAD CO.

JOHN M. TAYLOR, GEORGE H. ANDERSON AND SAMUEL B. FORTENBAUGH, JR.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF RESPONDENTS.

QUESTION PRESENTED.

When all objective facts have been furnished in answers to interrogatories under the Federal Rules of Civil Procedure, will it promote the administration of justice to require pre-trial production of statements or memoranda or recollections developed by counsel in the course of preparation for litigation?

STATEMENT OF THE CASE.

This case is before the United States Supreme Court to review the reversal by the Circuit Court of Appeals for the Third Circuit of a contempt order entered against two respondents and their counsel by reason of their refusal to answer interrogatories requiring them to produce written statements and memoranda prepared by counsel and further to record the work of counsel, all arising out of anticipation and defense of the within litigation.

Originally the five judges of the United States District Court for the Eastern District of Pennsylvania sat *en banc* to consider the prayer of the petitioner that an order be entered upon the said refusal of the two respondents and their counsel, and their unanimous opinion interpreted Rules 33 and 34 of the Federal Rules of Civil Procedure to require the production demanded. The respondents and counsel persevering in their refusal, an order of criminal contempt was entered by the District Court on September 5, 1945, sentencing the three to the Philadelphia County Prison until they should purge themselves.

An appeal was taken to the Circuit Court of Appeals for the Third Circuit and, argument having been had, first before three judges and later before the five judges of the Third Circuit joined by Judge Stephens of the Ninth Circuit, the order of the District Court was reversed. The Circuit Court, through Judge Goodrich, held that Rule 26 of the Federal Rules of Civil Procedure was alone applicable under the circumstances, but that the new obligations of the Rules created a new extended privilege which justified the respondents in their refusal to produce the "work product" of an attorney. Petition for certiorari was filed, denied and finally granted upon reconsideration.

The facts of the accident which is the basis of this litigation may be simply stated, since the merits are not presently involved:—

The Tug "J. M. Taylor" sank on February 7, 1943 with the loss of five lives while engaged in towing a carfloat of the Baltimore & Ohio Railroad across the Delaware River at Philadelphia. On February 10, 1943 the respondent-attorney, Samuel B. Fortenbaugh, Jr., was employed by the tug owners and underwriters to undertake potential litigation, both to defend against the legal representatives of the deceased crew and to sue the Baltimore & Ohio Railroad. On March 4, 1943 a public statutory hearing was held before the United States Steamboat Inspectors, at which the four survivors were examined. This record is a public document and has been made available to the petitioner herein. Aside from the within litigation, various claimants have appeared with counsel and in each instance the claims have been disposed of without suit; the tug owners and underwriters eventually determined to withhold immediate suit against the Baltimore & Ohio Railroad.

On April 2, 1943 counsel received a letter of demand from Louis F. McCabe, Esq., then representing the Estate of Norman E. Hickman. On November 26, 1943 the within civil action was filed by Freedman & Goldstein, Esqs., successor attorneys for the Estate of Norman E. Hickman, joining as defendants John M. Taylor and George H. Anderson, individually and trading as Taylor & Anderson Towing & Lighterage Company, and Baltimore & Ohio Railroad Co. Interrogatories were filed by the petitioner on November 27, 1944 and supplemental interrogatories on January 15, 1945.

The respondents answered the original complaint in 1943, thirty-nine detailed interrogatories in 1944, and the many sub-divided supplemental interrogatories in 1945. The respondents have voluntarily produced all information and data secured by the owners and underwriters in the course of business and investigation, including the survey report made upon the raising and drydocking of the Tug "J. M. Taylor", but excepting data, including the statements of the four survivors, prepared by counsel in the course of preparation for litigation.

Respondents have supplied the petitioner with all of the objective facts of the accident, including the names and addresses of all of the members of the crew of the tug. The respondents have given the condition of the tide, the direction of the wind, the size of the hawser, etc., etc., and have answered all of the detailed questions of fact that the imagination of the petitioner's counsel could devise. (See the sixteen printed pages of the Record, pp. 20-a to 35-a.)

The respondents and counsel have not produced the statements demanded in Interrogatory No. 38, which reads as follows:—

> "State whether any statements of the members of the crews of the Tugs 'J. M. Taylor' and 'Philadelphia' or of any other vessel were taken in connection with the towing of the carfloat and the sinking of the Tug 'J. M. Taylor'. Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports".

The petitioner has obtained all the objective facts relating to the accident. The respondents and counsel having persisted in their refusal to supply the form and arrangement of those facts as prepared by counsel in the course of litigation, an order was entered by the District Court as follows:— (Italics ours.)

> "ORDER.
>
> And Now, to wit, this 5th day of September, 1945, this case having come before the Court upon Defendant's exceptions to the 38th interrogatory and supplementary interrogatories propounded by Plaintiff, argument having been had before the Court en banc, and the Court having filed its written opinion requiring Defendants to answer Plaintiff's interrogatory and to produce certain statements and documents in connection therewith *under Rules 33 and 34 of Civil Pro-*

cedure for the District Courts of the United States, upon motion of Freedman, Landy and Lorry, Esqs., attorneys for Plaintiff, it is hereby ORDERED, ADJUDGED AND DECREED that Defendants, John M. Taylor and George H. Anderson, individually and trading as Taylor & Anderson Towing & Lighterage Company, and Samuel B. Fortenbaugh, Jr., Esq., as counsel and agent for those Defendants, shall forthwith answer Plaintiff's 38th interrogatory and supplementary interrogatories; *produce all written statements of witnesses obtained by Mr. Fortenbaugh, as counsel* and agent for Defendants; *state in substance any fact concerning this case which Defendants learned through oral statements made by witnesses to Mr. Fortenbaugh whether or not included in his private memoranda and produce Mr. Fortenbaugh's memoranda* containing statements of fact by witnesses or to submit these memoranda to the Court for determination of those portions which should be revealed to Plaintiff.

/s/ KIRKPATRICK,
U. S. D. J."

ARGUMENT.

Introduction.

There is no conflict in aims between the parties. We are all seeking what has been aptly described as "the efficient functioning of the judicial process". We are agreed that the Federal Rules of Civil Procedure have been a forward step in the simplification and expedition of practice and trial and particularly in the clarification of issues before trial.

Despite a few non-conformists, both among the practitioners and the bench, it is not now sufficient to object that examination under Rules 26, 33 and 34 is fishing or utilizing the diligence of the opponent, or that the information sought is inadmissible upon trial or is already known or available to the interrogator. The sporting theory of trial is no longer condoned, and we all desire to obtain justice with all the means consistent with expedition and efficiency. As is very usual, however, agreement in principle on the goal does not assure agreement as to the means of accomplishment.

It will be argued to your Honors that the respondents herein are stooges for the vested interests, wealthy corporations and underwriters. There will be much demagogic name-calling under the banner of alleged freedom of inquiry. Counsel respectfully submits that we are not here arguing aims but ways and means of accomplishing the same objectives. It may seem appealing to appear to ask only that all facts be made free for the judgment of the court; but even freedom of speech is conditioned; there are postal laws, pure food and drug acts, and libel laws, to name only a few.

The argument herein should not be colored by any spurious claim that this is a hardship case where the petitioner cannot prepare his claim and must not be surprised on trial. There were sixteen printed pages of detailed facts voluntarily supplied to the petitioner. There is only one

unanswered question, Interrogatory No. 38, calling for revelation of subjective treatment of the objective facts. The petitioner has never attempted to establish any prejudice to his case by the within withholding.

POINT I.

Federal Rules of Civil Procedure 26, 33 and 34 Do Not Presently Require Production of Writing Developed by an Attorney in Anticipation of Litigation.

It is not intended to urge a legalistic interpretation of the Federal Rules. It has been recognized by the Advisory Committee that there are distinctions in purpose and language between Rules 26, 33 and 34. As the Rules now read, they do not require the respondents to answer Interrogatory No. 38 and there is no ambiguity to be translated away.

Rule 26 is entitled "Depositions Pending Action" and the subsequent complementary Rules 28, 29 and 30 prescribe a procedure of examination and cross-examination by deposition, either orally or in writing before a notary public following notice. It is specifically provided in Rule 26-(a), "Depositions shall be taken only in accordance with these rules". Under Rule 26-(b), the scope of "deposition upon written interrogatories" is limited to any matter, not privileged, which is relevant to the subject matter involved in the pending action. Depositions upon written interrogatories are distinct in procedure and practice from the interrogatories to adverse parties under Rule 33.

Rule 33 provides that interrogatories may be served only "upon any adverse party", without any statement as to the scope thereof, except that "objections to any interrogatories may be presented to the court within ten days after service thereof, . . ." Counsel is not subject to Rule 33, and there is no requirement of any production of any nature, whether the document be original or copy.

Rule 34, entitled "Discovery and Production of Documents and Things for Inspection, Copying, or Photographing", sets up four requirements as follows:—

(1) "upon motion of any party showing good cause therefor"

(2) "any designated documents"

(3) "not privileged"

(4) "which constitute or contain evidence material to any matter involved in the action".

Accordingly, under the Federal Rules as they are, there is no authority for requiring, by simple interrogatory, the production of statements and memoranda made by counsel. The moving party here did not make any attempt to prove hardship or show any good cause for his motion as required under Rule 34. Counsel is not even subject to interrogation under Rule 33 which says nothing about producing anything. The petitioner did not proceed by deposition as provided in Rule 26, which would have permitted cross-examination under specified conditions. The further protection of "extended privilege" is applicable to all discovery under Rules 26, 33 and 34, as considered hereafter.

This same attempt to avoid the requirements of Rule 34 by assertion of procedure under Rule 33, although production of writing was demanded, was halted in *Gordon v. Pennsylvania R. Co.*, D. C., E. D. Pa., 9 Fed. Rules Serv. 34.13, Case 1, decided August 15, 1946. Therein District Court Judge Kalodner (now Circuit Court Judge) denied production because there was no showing of necessity, designation or materiality. In fact Judge Kalodner shows little sympathy with or approval of the District Court's opinion in this case, although he concurred therein.

In the District Court opinion, the question was raised whether the procedure was under Rule 33 or 34, and the order to produce and the contempt order, both dated September 5, 1945, specifically provide that the alleged failure lies under Rules 33 and 34. Until Judge Goodrich's opinion, it was never considered that the interrogation herein was under Rule 26, which is limited to depositions. Reference to that rule by counsel had been made in the

course of argument only for guidance in construing the scope of the examination and production required under Rule 34.

The amendments proposed in June, 1946 by the Advisory Committee on Rules of Civil Procedure propose to correlate and make uniform the scope of inquiry permitted under Rules 26, 33 and 34 and to extend the same protection to all parties examined, by cross-reference to an enlarged Rule 30. These proposals do not eliminate the necessity of choosing the appropriate discovery method and do not change the peculiar applicability of each rule to depositions, written interrogatories and production, respectively. It is significant that the proposed new Rule 34 still commences with the words "Upon motion of any party showing good cause therefor". In this case there has admittedly been no establishment of any hardship requiring production. Petitioner has made demand for the answer to Interrogatory No. 38 as a matter of right, requiring no justification.

POINT II.

Limiting the Scope of Discovery to Objective Facts Protects the Interrogator From Hardship and Preserves the Benefits of Trial by Jury.

Admitted that surprise as to issues and facts should be eliminated.

Denied that this petitioner does not possess all the facts.

Submitted that litigation should remain a proving ground for truth and not a literary contest, in which the jury passes on the merits of counsel's writings.

In the length and breadth of the petitioner's brief there is no reference to the pages of answers and testimony which have already been taken relating to the objective facts of the accident. The petitioner's plea is a generalized sob that it is unfair to withhold any of the facts. There is no

acknowledgment that all of the facts have been presented by full answers to other interrogatories than No. 38.

Not only does the petitioner's brief demand facts when he has all the facts, but he nowhere attempts to define what he means by "facts". Apparently petitioner concedes no limitation whatsoever on the scope of his examination, outside of strict historical privilege, and he sets himself up as the sole judge as to whether and how extensively he shall interrogate. He recognizes no duty to show cause and inveighs against the proposed amendment of the Advisory Committee which would put on him only the burden of satisfying the court that he is unfairly prejudiced by any withholding.

Admittedly, "facts" is an elastic word depending on the circumstances. But petitioner contends, in effect, that it comprises everything conceivable by the ingenuity of adverse counsel. It is respondents' position that facts are "what happened"; they may also include those events which preceded or followed the occurrence in order that the proper appreciation, analysis, and perspective can be applied. The writings of counsel recording the event are not within any definition.

It should not be necessary to use the term "objective facts" as respondents have done hereinbefore. This is done for the purpose of emphasizing a distinction not even recognized by the petitioner. Respondents admit the petitioner should be informed as to what happened, i. e., possess the facts which are at issue to expedite trial. Others can invent other terms to cover the facts subject to development by interrogation—"primary facts", "first degree facts", or what have you—but there must be a practical limit to psychoanalysis of incidental writing by counsel with a weak case.

Despite his plea for facts, counsel for the petitioner really wants to examine the form in which the facts were reduced to writing by opposing counsel. He wants to confuse the statement-givers on cross-examination, not as to

the validity of the facts, but as to possible different methods of stating those facts.

Counsel for the petitioner has various means at his disposal to ascertain and check the objective facts as such, and particularly those contained in the statments taken by counsel from the four survivors. He knows the identity and addresses of the individuals who are available locally. He can call them for pre-trial examination or can take their depositions by oral examination or written interrogatories. Counsel for the petitioner has already had available to him the record of the public hearing at which the four survivors testified. The only possible purpose of wanting the statements made by counsel for the defense is to twist phrases out of context and confuse the witnesses by questioning language used by defense counsel in recording the witnesses' reports.

It may be that counsel for the petitioner is advocating a dilution or elimination of the American system of trial by jury which requires the personal appearance of witnesses under oath subject to cross-examination. Every trial lawyer knows the salutary effect of the dignity of court proceedings upon a witness, and there is no question but that the give and take of the court room enables the jury to weigh the facts. Depositions are a sometime necessary method of obtaining and presenting evidence not otherwise available. Plaintiff here has not even used the deposition process with its give and take. But we should not substitute statements and counter-statements and everlasting cross-examination based on hearsay, in lieu of an examination directed to fact finding. Examining secondary sources is no substitute for fact evaluation and will not only lengthen but entirely pervert, the benefits of the American jury system.

It is one thing to agree that the sporting theory of justice should be eliminated, but the trial should still remain an adversary proceeding designed to bring out the truth by examination and cross-examination in open court.

We seek the truth in objective facts and not an examination of the "package" in which the same may be wrapped in the course of the investigation, whether by counsel or any agent, in the anticipation or preparation for litigation. When the interrogator has all the objective facts and the means of development by deposition and interrogation, it is no hardship to refuse him secondary writings and refer him to his day in court.

POINT III.

Extension of the Scope of Examination Beyond Objective Facts Is Worse Than Inconsequence Because It Creates Diversion of the Issue, Insures Uneven or Arbitrary Judicial Discretion and Breeds Conflicting Interests.

Freedom requires order. That is true whether you are concerned with freedom of speech or religion or discovery under the Rules of Civil Procedure. The unlimited rule of discovery urged by the petitioner can result only in chaos when judged by the agreed goal of promotion of efficient administration of the judicial process.

The chaos existing needs no further documentation. Moreover, the use of discovery under the new rules is still relatively unknown and the present difficulties and delays will multiply in geometric progression. Judge Goodrich has thoroughly annotated the progressive lack of uniformity and uncertainty. The June 1946 Report of the Advisory Committee collects all the decided cases (See Note re Rule 30-(b), pp. 40-46) and summarizes with understatement, "The district courts have been in disagreement over the extent to which such an inquiry may be made". There is no dispute that the federal courts in their orders under Rules 26, 33 and 34 have varied between Circuits and within Circuits, within Districts and from week to week within the self-same court.

In *Condry v. Buckeye S. S. Co.*, D. C., W. D. Pa., 4 F. R. D. 310 (1945) the District Court for the Western District of Pennsylvania, in circumstances very identical, re-

fused to order the production of memoranda or photographs by counsel. Distinguishing the Circuit Court's decision in *Hickman v. Taylor*, 153 F. (2d) 212, two District Judges of the Third Circuit reach opposite conclusions. Judge Kirkpatrick in *Shields v. Sobelman*, 64 F. Supp. 619, (1916) ordered the production of photographs taken by direction of counsel, but Judge Kalodner in *Gordon v. Pennsylvania R. Co.*, supra, denied production of statements taken by defendants, including a statement of the plaintiff himself. In *Piorkowski v. Socony Vacuum Oil Co.*, D. C., M. D. Pa., 1 F. R. D. 407 (1940), Judge Watson held that a liberal examination and discovery does not mean that one litigant can make use of his opponent's preparation of his case. Judge Kirkpatrick in *Stark v. American Dredging Co.*, D. C., E. D. Pa., 3 F. R. D. 300 (1943), refused to order the production of certain statements not taken by counsel. In February, 1945, Judge Ganey in *Schenley Import Corporation v. S. S. "S. Thome"*, D. C., E. D. Pa., No. 47 of 1944 in Admiralty (not reported) refused counsel for the within defendants the right to obtain a survey report.

A most striking illustration of uncertainty as to the proper scope of discovery is to be found in the decisions of Judge Moscowitz of the Eastern District of New York. In *McCarthy v. Palmer, et al.*, 29 F. Supp. 585, Judge Moscowitz denied the examination of affidavits and similar materials secured by independent investigation incident to the preparation of the case for trial. This decision was logically followed by *Olson v. New York Central R. Co.*, D. C., E. D. N. Y., 31 F. Supp. 745, (1940), in which Judge Moscowitz refused to require production of statements taken from employees of the other party before the commencement of the action. Good cause was again made the test of permissible scope in *Creden et al. v. Central R. Co. of New Jersey*, D. C., E. D. N. Y., 1 F. R. D. 168 (1940), the Court saying, "In absence of any showing why plaintiffs cannot secure this information from the witnesses themselves by deposition or otherwise, there is no reason to

permit plaintiffs to avail themselves of defendant's preparation of its case". The same denial was made by the same judge in *Gitto, et al., v. "Italia", Societa Anonima Di Navigazione, Genova,* D. C., E. D. N. Y., 31 F. Supp. 567, (1940), and in *Stern v. Exposition Greyhound, Inc.,* D. C., E. D. N. Y., 1 F. R. D. 696 (1941). But subsequently in *Dugger v. Baltimore & Ohio Railroad Co.,* D. C., E. D. N. Y., 5 F. R. D. 334, (Adv. Rep.) (1946), an opposite result is reached. Judge Moscowitz ruled, "There is no privilege attached because the statements were taken by the attorney for the defendant or some one in his behalf. The matter of privilege was discussed by the district court sitting en banc in the case of *Hickman v. Taylor,* 4 F. R. D. 479. That case was reversed by the Circuit Court of Appeals, Third Circuit, 153 F. 2d 212. It is clear that the ruling of the district court in *Hickman v. Taylor, supra,* is more in line with the policy of the Second Circuit".

See also:—*Bowles v. Ackerman et al.,* D. C., S. D. N. Y., 4 F. R. D. 260; *Walling v. Richmond Screw Anchor Co, Inc.,* D. C., E. D. N. Y., 4 F. R. D. 265. (These cases limit production to evidence secured by the adverse party upon which the party would rely at a trial.); *Condry v. Buckeye S. S. Co., supra,* (Documents were not evidence); *Sonken-Galamba Corporation et al., v. Atchison T. & S. F. Ry. Co., et al.,* D. C., W. D. Mo., 30 F. Supp. 936, (Required designation of documents and showing of materiality); *Kenealy v Texas Co.,* D. C., S. D. N. Y., 29 F. Supp. 502; *Fluxgold v. United States Lines Co.,* D. C., S. D. N. Y., 29 F. Supp. 506. (Both cases hold that the statements of witnesses demanded did not constitute evidence); *Creden v. Central R. Co. of New Jersey, supra,* (Production refused because adverse party could get statements from witnesses himself); *Poppino v. Jones Store Co.,* D. C., W. D. Mo., 1 F. R. D. 215, (Cannot compel production of evidence to be used by adversary); *United States v. Aluminum Co. of America, et al.,* D. C., S. D. N. Y., 1 F. R. D. 57, (Documents must be evidence and material or probably material,

not for refreshing recollection or as clues to evidence); *Seals v. Capital Transit Co.*, D. C., Dist. of Columbia, 1 F. R. D. 133, (No good cause shown); *Courteau v. Interlake S. S. Co., et al.*, D. C., W. D. Mich., N. D., 1 F. R. D. 525, (No showing of probable materiality); *United States v National City Bank of New York, et al.*, D. C., S. D. N. Y., 2 F. R. D. 46, (Must show relevancy and materiality); *Coca Cola Co. v. Dixi-Cola Laboratories, Inc.*, D. C., Md., 30 F. Supp. 275, (More than fifteen or twenty interrogatories are burdensome).

It is history that well-intentioned lack of uniformity has created chaos because there are no standards to apply where you allow unlimited examination. If a uniformity of action had resulted from application of the discovery rules, the argument here could be limited to the rightness of the construction. As it has developed, there is no precedent citing which is helpful for the next case. All of the courts have agreed that the rules generally are forward-looking and have expedited trial in simplifying the issues. But when it comes to the discovery provisions, the courts have been riding off in all directions.

Recognizing the difficulties of mathematical standards, it is still possible to develop an elastic formula which will at least designate the interrogator as the burdened party and the measure of proof of hardship to be produced by him. Without some amendment or change as hereafter discussed, there will be chaos or inflexible discretion; probably the latter will be the end result, which also is to be avoided. The District Court Judges of the Eastern District of Pennsylvania, following the decision herein and before the Circuit Court opinion, simply refused to allow any objection to interrogation; there was no time for the application of discretion.

It has already been noted under Point II of this brief that petitioner can have no other purpose than diversion in his interrogation since he has all the facts. All trial lawyers are familiar with the possibilities of taking the

witnesses and jury down the by-ways of immateriality. Don't let the trial become a contest of the literary styles of opposing counsel.

In previous arguments, counsel has urged that unlimited scope has burdened and will cumulatively place an intolerable burden on the courts. This is an empirical argument which we do not like to make because the federal courts have always been eager to assume any burden which would assist in achieving justice. But, if there is no appealing argument based on the size of the burden on the courts, nor even in the practical inflexibility which has frequently arisen to overcome the burden, it remains unanswerable that the burden need not be created and the burden is not practicably resolvable by any discretion, however well-intentioned and cheerfully assumed.

This burden on the courts cannot be shrugged off by agreement in principle on the benefits of perfect application of general discovery rules. Undoubtedly the burden has varied between circuits, but equally it is increasing. Every single case in the District Court for the Eastern District of Pennsylvania is now a forum for extended interrogation and frequently the Judges have to consider objections to every single question, which require not only examination of the issues and evidence, but all the possible hearsay. We have no quarrel with the holding per se that interrogation goes beyond admissible evidence, but it does enlarge the burden on objections by enlarging the scope of inquiry. Possibly also, admissibility in trial will be enlarged, although this is a result the petitioner would strenuously oppose. See *Edison Electric Co. v. U. S. Electric Lighting Co.*, 45 Fed. 55, 59.

We need not go beyond this case to see the possibilities. A year and ten months after the happening of the accident, and a year after the suit was filed, counsel for the petitioner filed thirty-nine interrogatories with sub-divisions. Thereafter, he filed supplemental interrogatories, again with sub-divisions. Similar detailed questions were

served on the Baltimore & Ohio Railroad Company. To date the co-defendants have not served interrogatories on one another, and respondents' interrogatories upon petitioner are being held in abeyance pending the decision herein.

It has been generally conceded in argument herein that, if interrogatories are to embrace the attorney's files and his work generally, then it is inevitable that in each case the attorney will be a witness. Petitioner has wrongly belittled the frequency with which this will occur, but wherever there is a limit of effective discrediting through the use of these statements, opposing counsel will have to take the stand. Certainly if witnesses are to be cross-examined on the basis of writings developed and produced by the attorney, then the attorney will be allowed the opportunity to explain the circumstances and interpret and develop the facts in his possession. The opinion of Judge Goodrich predicts the undesirable consequences of this procedure.

Under the decision of the District Court herein, counsel planned to serve interrogatories on adverse counsel the first Monday of each month to get a progress report. How else be sure that opposing counsel has not done some more writing? It is doubtful if this would have been helpful toward expedition or simplification. It might be helpful to take a memory course to avoid any writings, although the District Court attempts to prevent even this.

Recognizing that the members of the bar will adapt themselves to any new rules, however revolutionary, and recognizing that the profit motive is not the number one factor with an attorney it should still be remembered that our common law system has worked successfully for hundreds of years. It cannot be ignored (1) that attorneys are officers of the court, superior in training and subject to discipline, and (2) that they are the employees of private clients and should not be subject to conflicting loyalties as between client and adverse parties. In an ideal world where abstract justice would be a matter of routine, this argu-

ment would be unnecessary. It certainly is not appealing to ask this Court to be realistic in remembering that attorneys are the paid employees of private clients. We will be the first to urge upon the Court that attorneys are officers of the court sworn to uphold the principles of justice, because that is one reason why attorneys as a class should be "privileged".

It does not change the fact, however, that any decision requiring "writing" production by the attorney will create a conflict of interest because the law in this country has been built around an entirely different concept of the duties of an attorney. All attorneys are immediately conscious of the necessity of never representing conflicting interests. If there is any possibility that such a conflict may develop, attorneys scrupulously avoid the chance of being on both sides because of the recognized difficulty of then being disinterested. Under any unlimited rule, every case presents the possibility of the attorney being both advocate and witness; every writing taken or witness interviewed may force the attorney to testify for or against his client. This will create a deadening influence to prevent any investigation looking toward understanding and possible settlement. Attorneys have a duty to be active and not to remain passive because it may create conflicts and harm their clients.

In this bright new world of discovery, it is both possible and practical to preserve complete inquiry and competitive attorneys, but, again, it is submitted that this requires a rule of order to allow litigants full investigation without fear that efforts will be misconstrued and attention diverted into literary by-ways.

POINT IV.

The Discovery Rules Should be Construed Uniformly and Amended, if Necessary, to Exempt Data Developed in Anticipation of Litigation, Particularly by Counsel.

The English have a rule for it and the Advisory Committee has proposed amendments to assure it, i. e., protec-

tion from discovery of writings prepared in anticipation of litigation. Thereunder the writings so developed, whether by the parties, their agents or counsel, are not subject to production, except in hardship cases where "the burden (is placed) on the person seeking the discovery of the writing to demonstrate the necessity therefor". (Report of Advisory Committee, p. 46.) The decision of the Third Circuit Court herein represents a limitation on recognized safeguards rather than new prohibitions.

It is customary to refer to the English administration of justice as incorruptible, fair and expeditious. However uncritical such comment, it is significant that the English Judicature Act of 1873, as amended, was the precursor of our own Rules and thereunder there has been extended even larger protection to data developed in anticipation of litigation than now proposed in the amendments of the Advisory Committee. English Rules Nos. 1 and 14 of General Order 31, entitled "Discovery and Inspection", read as follows:—

> "*Rule 1—Discovery by Interrogatories.* In any cause or matter the plaintiff or defendant by leave of the Court or a Judge may deliver interrogatories in writing for the examination of the opposite parties; or any one or more such parties . . . Provided that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness. (R. S. C. Nov. 1893, as amended 1917)".

> "*Rule 14—Order for Production of Documents.* It shall be lawful for the Court or a Judge, at any time during the pendency of any cause or matter, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter as the Court or Judge shall think right; and the Court may

deal with such documents, when produced, in such manner as shall appear just".

The English Rules make production a matter for court discretion at any time in any matter, but that discretion is never exercised to allow inquiry into the solicitor's records. Our Rule 34 provides that the moving party shall (1) show good cause to produce (2) any designated documents . . . or tangible things (3) not privileged (4) which shall contain material evidence. These four conditions precedent are absent from the language of the English Rule 14, but the English courts would be shocked at the decision of the lower Court herein. The English rule is construed to protect the interest of the client in the development of his case so long as litigation is contemplated or pending, and is directly contrary to the decision of the lower Court herein.

The English cases recognize two types of "privilege", although that term is not incorporated in the language of the rule itself as it is in our Rules. First, all communications between solicitor and client are privileged to be free from production at all times and under all circumstances; second, where litigation is contemplated or pending, any document, regardless of source and by whomsoever prepared, is likewise protected, whether there is any communication between client and solicitor or not. The English courts recognize the benefit to the good working of the judicial system by protecting the client to an absolute extent, unlimited by whether the work and effort are done by the solicitor or his agent or by the client or his agent, relating to third persons or anybody, so long as litigation is contemplated or pending and the work is connected therewith.

In other words, the English courts are cloaked with "discretion" alone and yet administer a practical system of extending "privilege" in matters of discovery to all the work product of the solicitor engaged in litigation.

The present scope of such discovery is well summarized in the following quotations from Page 500 of "THE YEARLY PRACTICE OF THE (English) SUPREME COURT FOR 1938":—

> "Communications between a solicitor and a non-professional agent or a third party, directly, or through an agent, which come into existence after litigation is contemplated or commenced and made with a view to such litigation, either for the purpose of obtaining or giving advice as to it, or of obtaining or collecting evidence to be used in it, or which may lead to the obtaining of such evidence, are privileged".
>
> "Documents obtained by a solicitor with a view to enabling him to prosecute or defend an action, or give advice with reference to existing or contemplated litigation, are privileged".
>
> "Documents prepared confidentially after a dispute has arisen between the plaintiff and the defendant and for the purpose of obtaining information, evidence or legal advice with reference to litigation existing or contemplated between the parties to an action, are privileged".

The June 1946 discovery rule amendments proposed by the Advisory Committee would be decisive in this case to relieve the respondents. They are a compromise attacked by the extremists on both sides. Opposing counsel herein states in his brief that such amendments are outrageously restrictive in putting him under any burden. Undoubtedly the moving attorney, under the proposed amendments, could not meet his burden by unsupported generalities as to his own deficiencies, but it is not too much and may be too little to require him to "satisfy" the court as to his prejudice through non-production of writings. There has also been criticism of the proposed amendments on the ground that they retain all the faults potential in the present Rules in continuing discretion in the courts to order answer without sufficiently definite standards. As usual, we find one side

wanting no rule of limitation, the other demanding an absolute ban on discovery, and neither side considering that the amendments are limited to "writings".

Your Advisory Committee composed its amendments following the *Hickman* decision in order to meet the problems and issues there raised. The intention of the Advisory Committee was to limit discovery so far as "writings" were concerned while disapproving some of the reasoning of the decision of the Circuit Court herein. We have the report of the Vice-Chairman as authority for the intention of the Advisory Committee to limit discovery,—(5 F. R. D. 406).

> ". . . It was the general sense of the Committee that wherever the statement, whether in oral or written form, embodies what is aptly called in the Hickman case the 'work product of the lawyer,' that that should be immune from the processes of discovery; and you will notice that it is provided in the amendment which has been distributed to you that that shall under no circumstances be made the subject of discovery."
>
> ". . . In the case of the amendment 30 (b) the proposal now is to provide that statements of fact witnesses shall not under ordinary circumstances be within the scope of discovery, but the element of discretion is left to the court to compel their production if in the judgment of the court there would be a failure of justice if they were not to be produced; as, for example, where it would then become impossible for a plaintiff to formulate his case or a defendant to prepare his defense."
>
> ". . . The lawyer's function as it issues in his work product is, under the proposed amendment, absolutely immune."

It has been the position of counsel from the inception of the question herein that the courts had ample power to limit interrogation and protect client and counsel from inquisition, without any amendment of the Rules of Civil Pro-

cedure. Rule 30 (b) gives the courts power "to make an order . . . that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters; . . . or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment or oppression". It would thus appear that the power to limit has always resided in the trial courts and the requirement for amendments is not for change but for definition by standards. Because there has been so much diverse application, it is time for restatement.

The Procedural Rules Committee of the Supreme Court of Pennsylvania has reached the same conclusion that discovery must be limited as evidenced by its proposal of Rule 4007, reading as follows:—

> "Rule 4007. Limitation of the Scope of Deposition, Examination or Inspection.
>
> A deposition, examination or inspection shall not be directed to the securing, from a party or the insurer of a party, or the attorney or agent of either of them, of information obtained in preparation for the pleading or proof of a claim or defense".

To this point, counsel has not even referred to the "work product" of an attorney, or to the theory of "extended privilege". If the broad argument incorporated by the Advisory Committee, as hereinbefore presented, is accepted, there is no necessity of granting special status to the attorney to prepare his case. The theory of the Circuit Court decision was one developed and pressed by counsel for the respondents from the commencement of this litigation, but only as a final alternative which would be essential if the broader protection were not made available. The anomalous position of the attorney attempting to develop fully his case under the unlimited rule sought by the petitioner herein, only dramatizes the general unworkability of the rule *reductio ad absurdum*. It is history that the privi-

lege granted the attorney-client relationship
the imposition of testimonial compulsion. T
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Conclusion.

It is respectfully submitted that the de
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Jr.,

& McCown,
for Respondents.

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